INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	8

CITATIONS

Cases:

Brown v. *Johnston*, 91 F. 2d 370, certiorari denied, 302 U. S. 728 — 6

Edwards v. *Aderhold*, 73 F. 2d 374, certiorari denied *sub nom. Knight* v. *Aderhold*, 294 U. S. 710 — 6

Ellerbrake v. *King*, 116 F. 2d 168 — 6

Eyler v. *Aderhold*, 73 F. 2d 372 — 6

Hammerer v. *Huff*, 110 F. 2d 113 — 7

Miketich v. *United States*, 72 F. 2d 550 — 7

Tippitt v. *Squier*, 145 F. 2d 211 — 7

Tippitt v. *Wood*, 140 F. 2d 689 — 7

Zerbst v. *Kidwell*, 304 U. S. 359 — 5, 7

Statutes:

Act of June 29, 1940, c. 449, § 1, 54 Stat. 692 — 5

Harrison Narcotic Act (26 U. S. C. 2550 *et seq.*) — 2

18 U. S. C. 709a — 6, 7, 9

18 U. S. C. 710, 713 — 5

18 U. S. C. 716b — 2, 5, 9

18 U. S. C. 717 — 5, 9

18 U. S. C. 718 — 10

18 U. S. C. 719 — 10

18 U. S. C. 723c — 5, 8, 10

683077—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 747

ANTHONY TERAMINE, PETITIONER

v.

C. J. SHUTTLEWORTH, WARDEN, FEDERAL CORRECTIONAL INSTITUTION, MILAN, MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The circuit court of appeals rendered no opinion. The judgment of that court (R. 24) is reported at 151 F. 2d 602.

JURISDICTION

The judgment of the circuit court of appeals was entered on October 17, 1945 (R. 24). The petition for a writ of certiorari was filed on January 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a prisoner while in custody under a parole violation warrant may be validly sentenced on conviction for another offense to serve a term of imprisonment to begin at the expiration of the unexpired term of his first sentence.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 9–10.

STATEMENT

Petitioner was convicted on his plea of guilty in the United States District Court for the Eastern District of Michigan of violations of the Harrison Narcotic Act (26 U. S. C. 2550, *et seq.*), and he was sentenced on November 20, 1934, to imprisonment for a term of eight years (R. 7–9). On April 26, 1940, he was released conditionally (on parole) pursuant to the provisions of 18 U. S. C. 716b (Appendix, *infra,* p. 9). On April 15, 1942, a member of the Board of Parole issued a warrant for petitioner's retaking on the ground that he had violated the conditions of his release by submitting false reports in February and March 1942. He was retaken on April 18, 1942, committed to the Wayne County Jail at Detroit, Michigan, and delivered to the Federal Correctional Institution at Milan, Michigan, on May 26, 1942. (R. 15–18.)

In the meantime, on May 25, 1942, petitioner pleaded guilty in the District Court for the East-

ern District of Michigan to an indictment charging conspiracy to violate the Harrison Narcotic Act, and he was sentenced on that date to imprisonment for a term of two years, the sentence to run consecutively to the sentence that petitioner "is now serving in Case No. 21737 [the earlier case]" (R. 3–4). The Federal Correctional Institution at Milan, Michigan, was designated by the Marshal, the authorized representative of the Attorney General, as the place of confinement, and the Marshal's return bears the endorsement that petitioner was delivered to the Wayne County jail on May 25, 1942, pending transfer to the designated institution, and that on May 26, 1942, he was delivered to that institution (R. 5). On August 7, 1942, the Board of Parole revoked petitioner's parole under the earlier sentence (R. 2).

The present proceeding arose upon a petition for a writ of habeas corpus filed by petitioner in the District Court for the Eastern District of Michigan on November 24, 1944. Petitioner alleged that he was entitled to his release from custody on the ground that he had completed the service of both of his sentences. He asserted that he had begun to serve the second sentence of two years on May 25, 1942, and that he had completed service of it and of the unexpired portion of the first sentence on November 9, 1944. (R. 1–10.) An order to show cause was issued (R. 11), and the respondent filed an answer in which he alleged that petitioner had not begun to serve the

second sentence until November 10, 1944, the day following his completion of service of the first sentence (R. 12–18). After hearing argument, the district court dismissed the petition for a writ of habeas corpus (R. 19). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the order was affirmed, the court holding that petitioner did not begin to serve his second sentence until November 10, 1944 (R. 24).

ARGUMENT

In this Court petitioner contends (Pet. 2–3, 9–20), as he did in the courts below, that he began service of his second sentence of two years on May 25, 1942, and that he had completed serving that sentence and the unexpired term of his original sentence on November 9, 1944. His argument, as we understand it, is that his conviction for the second offense constituted a violation of his parole which interrupted and suspended service of his original sentence, and service thereof did not begin again until May 26, 1942, when he was returned to the penitentiary; that, accordingly, his imprisonment on May 25, 1942, at the Wayne County jail must be attributable to his second sentence; and, presumably, that after May 26, both sentences were being served concurrently. We submit that these contentions are plainly without merit.

Contrary to petitioner's views, he was serving the unexpired portion of his original sentence

at the time he was again sentenced on May 25, 1942. Service of the original sentence of eight years began on November 20, 1934, and the maximum term thereof would not have expired until November 19, 1942. When petitioner was conditionally released on April 26, 1940, pursuant to the provisions of the "good-time" statute (18 U. S. C. 710, 713), he remained on parole under 18 U. S. C. 716b (*infra*, p. 9) for the maximum term of his sentence. Before that time arrived, the Board of Parole was authorized under 18 U. S. C. 717 and 723c (*infra*, pp. 9–10) to issue a warrant for his retaking on the ground that he had violated his parole. This it did on April 15, 1942.[1] At that time, at least, service of petitioner's original sentence was interrupted and suspended because he had breached his parole. Cf. *Zerbst* v. *Kidwell*, 304 U. S. 359, 361, 362. Petitioner was taken into actual custody under the warrant on April 18, 1942, and this step, under 18 U. S. C. 723c (*infra*, p. 10), constituted a resumption by petitioner of service of his sentence.[2] Cf. *Zerbst* v. *Kidwell*, 304 U. S. at p. 362. There-

[1] It appears that the parole violation was that petitioner had submitted false reports to the Board of Parole in February and March 1942 (see R. 15).

[2] Petitioner's argument (Pet. 10–14) that his unexpired term could not under Section 723c begin to run until he was actually returned to the penitentiary is predicated on the language of the Section as it read prior to its amendment by the Act of June 29, 1940, c. 449, § 1, 54 Stat. 692. Before the amendment the Section contained the language: "The unex-

fore, when the sentence of May 25, 1942, was imposed, petitioner, as that sentence recognized (*supra,* p. 3), was serving his original sentence.

Furthermore, it is clear that the direction in the second sentence that it should run consecutively to the first sentence (*supra,* p. 3) was proper. The requirement of 18 U. S. C. 709a (*infra,* p. 9) that a sentence of imprisonment shall commence to run from the date on which the prisoner is received at a jail to await transportation to the designated place of confinement, does not abolish the long-sanctioned practice of imposing consecutive sentences to begin at a future time. The purpose of this Section was to insure a prisoner credit for the time he might spend awaiting transportation to the place of confinement. *Brown* v. *Johnston,* 91 F. 2d 370, 372 (C. C. A. 9), certiorari denied, 302 U. S. 728; *Ellerbrake* v. *King,* 116 F. 2d 168, 170 (C. C. A. 8). And a prisoner serving one sentence is not delivered for service of a second consecutive sentence within the meaning of the statute until the first sentence has legally expired. *Eyler* v. *Aderhold,* 73 F. 2d 372 (C. C. A. 5), followed in *Edwards* v. *Aderhold* 73 F. 2d 374 (C. C. A. 5), certiorari denied *sub nom. Knight* v.

---

pired term of imprisonment * * * shall begin to run from the date he [the prisoner] is returned to the institution." As amended, the Section contains the following language: "The unexpired term of imprisonment * * * shall begin to run from the date he is returned to the custody of the Attorney General under said warrant * * *."

Aderhold, 294 U. S. 710; *Miketich* v. *United States,* 72 F. 2d 550 (C. C. A. 3). Here petitioner's first sentence did not terminate until November 9, 1944 (R. 2, 13), and it was at that time that he was "received" (18 U. S. C 709a) at the penitentiary for service of his second sentence.

Finally, there is no basis for petitioner's claim (Pet. 4, 8, 9, 16–18, 19–20) that the direction in the second sentence that it should run consecutively to the first sentence is void because it constituted an illegal mandate to the Board of Parole that it must revoke petitioner's parole in order to make the direction effective. Petitioner relies (Pet. 16–18) on several cases in the lower federal courts holding that in the case of a prisoner convicted of an offense while at large on parole, the sentence may not validly direct that it shall run concurrently with the unexpired term of his original sentence, since such a direction would compel the Board of Parole, in order to give effect to it, to have the prisoner at once resume service of his original sentence, whereas, under *Zerbst* v. *Kidwell,* 304 U. S. 359, the Board is exclusively authorized to require a parole violator to serve the unexpired portion of his sentence in prison, in addition to a sentence for an offense committed while on parole. *Tippitt* v. *Squier,* 145 F. 2d 211 (C. C. A. 9); *Tippitt* v. *Wood,* 140 F. 2d 689 (App. D. C.); *Hammerer* v. *Huff,* 110 F. 2d 113 (App. D. C.). Manifestly, these cases do not avail petitioner. The situations are not similar.

In the cases cited the Board of Parole had not acted to have the prisoner resume service of his original sentence, and the court's direction that the second sentence should be served concurrently with the original sentence could not be given effect unless the Board caused immediate resumption of service of the original sentence. In this case, on the other hand, the Board of Parole, prior to the imposition of the second sentence, had, by causing petitioner to be taken into custody under the warrant, brought about by operation of law (see 18 U. S. C. 723c, *infra*, p. 10) a resumption of service of the original sentence. The direction in the second sentence was not dependent for performance upon future Board action.

CONCLUSION

The case was correctly decided below, and there is no conflict of decisions or question of importance involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

FEBRUARY 1946.